burden of showing that it is somehow unable to offer a form of interconnection that has been found (either voluntarily or as a result of arbitration) to be feasible of any other incumbent LEC.[32]

B. The Commission Should Require All Pre-Existing LEC-to-LEC Interconnection Agreements To Be Reviewed Under The Terms Of Section 252.

The Commission has sought comment on whether the requirement of Section 252(a)(1) that "... any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State Commission [for review] under subsection (e) of this section" applies to agreements between incumbent LECs whose territories abut one another, or other pre-existing interconnection agreements. ***Notice*** at ¶¶ 48, 170-71. From Jones's perspective, the Commission could substantially enhance the negotiating process called for by Section 251(c)(1) by requiring incumbent LECs to submit interconnection contracts the incumbent may have in place with abutting LECs and/or affiliates to the Section 252 review process.

The literal terms of the law require all incumbent LECs who are parties to these pre-existing agreements have an obligation to submit them to the state Commission for approval. Section 252(a)(1) of the new law states that "... any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State Commission [for review] under subsection (e) of this section." Clearly, an agreement between two incumbent LECs for the exchange of traffic qualifies as an "interconnection agreement." These agreements should, therefore, be filed with state Commissions for review and approval under the standards applicable to non-arbitrated agreements under Section 252(e)(2)(A).

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[32] ***Cf. Notice*** at ¶ 56 (proposing to place burden of proving harm to the network on the party alleging that the harm exists).

It is conceivable that the incumbent LECs could argue that Congress "really" only "meant" to require the submission of interconnection agreements between competing entities. Such agreements might have been entered into, for example, in states such as New York or Florida that were far enough down the path of fostering local exchange competition for such competitor-to-competitor agreements to exist. Agreements between non-competing LECs with abutting territories, under this view, would not be covered by the new statute.

The difficulty with such an argument is that nothing in the language of the Act or the legislative history supports it, and what matters is what Congress said, not what a LEC might think that Congress might have meant to say. While interconnection agreements between competitors would certainly be covered by the language of Section 252(a)(1), nothing in that language limits the scope of Section 252(a)(1)'s requirement to such agreements.

Requiring LEC-to-LEC agreements to be reviewed and approved under Section 252 would also facilitate negotiations between incumbent LECs and new entrants. On the face of it, the interconnection agreements that incumbent LECs have with each other would provide a good baseline for negotiating interconnection arrangements with new entrants. This is because the pre-existing interconnection agreements were negotiated in an era of protected monopoly territories. These agreements were negotiated between firms who knew that their core markets were not threatened by interconnecting with each other. As a result, their interconnection arrangements were crafted with an eye towards minimizing the cost and administrative burdens on the interconnecting carriers while ensuring that customers were well served by a technically satisfactory exchange of traffic. These same goals — low cost, administrative efficiency, and technical adequacy — are precisely what the Commission should be trying to encourage in the interconnection agreements being negotiated between incumbent LECs and new entrants.

Moreover, the new law requires interconnection agreements between incumbent LECs and new entrants to be "nondiscriminatory," whether reached through negotiation or through arbitration proceedings under Section 252.[33] It is literally impossible for a new entrant in negotiations, or a state Commission reviewing an interconnection dispute, to determine if a particular interconnection agreement is discriminatory without knowledge of the contents of generally similar agreements to which the incumbent LEC is a party.[34] What this means in practical terms is that the negotiations envisioned by Sections 251(c)(1) and 252(a) cannot reach the result mandated by those laws — a nondiscriminatory agreement — unless all affected parties have access to the agreements which the LEC already has in place with others.[35]

For all of these reasons, the Commission should specifically rule that pre-existing LEC-to-LEC interconnection agreements should be filed with the appropriate state commissions for review under the terms of Section 252.

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[33] Section 252(e)(2)(i) requires that negotiated agreements must not "discriminate against a telecommunications carrier not a party to the agreement". If arbitration of an interconnection dispute is required, then a variety of additional nondiscrimination obligations apply. ***See*** Section 251(c)(2)(C) (interconnection must be "at least equal in quality to that provided by the [LEC] to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection"); Section 251(c)(2)(D) (interconnection must be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory"); Section 251(c)(3) (access to unbundled network elements must be provided "on rates, terms and conditions that are just, reasonable and nondiscriminatory"); Section 251(c)(4)(B) (incumbent LEC must not "impose unreasonable or discriminatory conditions or limitations" on resale of its services). All told, these statutory provisions should create a strong presumption against efforts by LECs to limit any of its offerings by customer class, type of carrier, or otherwise. ***See Notice*** at ¶ 175.

[34] Incumbent LECs may have a number of arguments supposedly showing why the circumstances surrounding their pre-existing agreements with other LECs are so different from the circumstances surrounding potential agreements with new entrants that any "discrimination" that might exist is justified. Even if the new law would tolerate "justifiable" discriminations, however — a questionable claim at best — it is impossible for state Commissions or the affected new entrants to assess the validity of such arguments without having the agreements themselves available for review.

[35] This is why the federal law requires that all interconnection agreements be made public and that any party seeking interconnection have the right to interconnect under the terms of any previously approved agreement. ***See*** 47 U S.C. §§ 252(h), 252(i).

IV. Establishing Prices For Interconnection, Unbundled Network Elements, And The Transport And Termination Of Local Exchange Traffic.[36]

For "transport and termination of traffic," Section 252(d)(2)(A)(ii) calls for a rates based on a "reasonable approximation of the additional costs associated with the transport and termination" of that traffic.

A. The Commission Should Require Network Elements And Interconnection Arrangements To Be Priced At Incremental Cost, With No "Profit" Component.

Section 251(c)(2)(D) requires that the rates for "interconnection" (which includes both particularized interconnection arrangements and facilities, as well as mutual traffic exchange) be "just, reasonable, and non-discriminatory, in accordance with ... the requirements of this section and section 252." Section 251(c)(3) imposes an identical requirement on the rates for unbundled network elements. The referenced "requirements of ... section 252" that apply to "interconnection" and "network elements" (Section 252(d)(1)(A)) state that rates be "based on cost ... nondiscriminatory and may include a reasonable profit."

Jones agrees with the Commission that the statute contemplates that rates for "interconnection" arrangements and unbundled network elements should be based on some appropriate measure of forward-looking incremental cost, not rates set either to recover historical embedded costs (as in a traditional rate case proceeding) or to recover a significant contribution over and above incremental cost. ***See Notice*** at ¶¶ 123-125. The statute requires that "cost" for these purposes must be determined "without reference to a rate-of-return or other rate-based proceeding." In practical terms, this means that the cost of a particular network element or type of interconnection would need to be determined on the basis of a study of the particular item in question. Incumbent LECs routinely undertake such cost studies, either to justify the rates for individual services regulated by the states, or in the context of state-level incentive regulation

[36] This section of these comments addresses issues raised in Section II.B.2 of the ***Notice.***

plans, which frequently contain a requirement that incumbent LECs may not price any service below incremental cost.

In these circumstances, of necessity the initial determination of the "cost" of a type of interconnection or network element will be undertaken by the incumbent LEC. This creates a situation in which the incumbent LEC will have a strong financial and market incentive to identify as high a "cost" as possible for those items that its competitors will need the most, while identifying as low a "cost" as possible for items that the LEC itself will use while its competitors may not. In order to minimize the negative effects of this problem, the Commission should spell out, in reasonable detail, the particular incremental costing principles that the LEC must apply in estimating the "cost" of network elements and interconnection arrangements. ***See Notice*** at ¶¶ 126-133.

Jones believes that the Commission should establish costing principles that result in the lowest possible interconnection/network element rates that are consistent with the statutory requirement that those rates be "based on" cost. Such an approach would serve the public interest in encouraging competition in several ways. First, other things being equal, it would minimize the costs that new entrants must incur in beginning to compete with the incumbent LECs. This will permit competition to grow more quickly than would otherwise be the case. Second, as a policy matter, the Commission should discourage LEC-to-LEC pricing regimes that encourage competing LECs to view each other as potential profit centers. The focus of competition between LECs should be providing end users with the best possible services at the lowest possible cost. From this perspective, LEC-to-LEC pricing decisions are an opportunity for gamesmanship unrelated to the competition the new law is intended to foster. Interconnection between competing LECs is a necessity for all concerned if this competition is to grow, so everything possible should be done to facilitate such interconnection.

For these reasons, the Commission should not permit the incumbent LECs to include a "profit" component in the cost-based prices established for interconnection and network elements until such time as the new entrant seeking interconnection has obtained some threshold level of market penetration (e.g., 15%).[37] In this regard, Jones believes that it is significant that the statute states only that such rates "may" include a reasonable profit, as opposed to stating that such a profit "must" or "shall" be included in the rate calculation.[38] By making clear that LEC-to-LEC interconnection shall not be a "profit center" or "line of business" for incumbent LECs, the Commission would help focus all market participants on the needs of customers which, as noted above, is the real purpose of the new law.

B. Bill-And-Keep Arrangements.

Section 252(d)(2)(B)(i) states that the pricing standards of Section 252(d)(2) should not be construed to preclude "bill-and-keep" arrangements in connection with the exchange of traffic between new entrants and incumbent LECs. The only reasonable interpretation of this provision is that regulators may impose a bill-and-keep arrangement over the objection of an incumbent LEC. This is because Section 252(d)(2) only applies to cases where an agreement is being arbitrated; if the parties agree, Section 252(d)(2) does not come into play.[39]

Jones will only summarize the arguments, with which the Commission is already deeply familiar, in favor of bill-and-keep arrangements. ***See Notice*** at ¶ 241-242. Briefly, bill-and-keep minimizes administrative costs and eliminates incentives to "game" the LEC-to-LEC

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[37] ***See Notice*** at ¶ 129 (seeking comment on application of the statutory provision regarding "reasonable profit").

[38] This language can only mean that the allowance of a profit element is discretionary with a regulator assessing the reasonableness of a price that is disputed in the context of an arbitration. The only other possibility — that the inclusion of profit is at the option of the incumbent LEC — obviously makes no sense, since in all cases the incumbent LEC would "choose" to include a profit in the rates it charges its competitors.

[39] ***See Notice*** at ¶ 243. Under Sections 252(a)(1) and 252(e)(2)(A), if an entire agreement is reached through negotiation, that agreement need not meet the standards of either Section 251 or 252, and must be approved unless it contravenes the public interest or is discriminatory to non-signatories. And if parties agree to "bill-and-keep" arrangements voluntarily but seek arbitration on other issues, again the question will not come up, because Section 252(b)(4)(A), the only issues subject to arbitration are those on which the parties do not agree.

relationship by soliciting (or avoiding) customers with high incoming or outgoing usage. In addition, if traffic termination costs of new entrants are considered to be at least as high as those of incumbents (a reasonable conclusion since new entrants will usually lack economies of scale), and if traffic is, on average, balanced (no net minutes terminated on either carrier), then bill-and-keep simply reflects accurate cost-based compensation. Finally, and most fundamentally, end user customers pay for (among other things) the ability to ***receive*** calls.[40] Under a bill-and-keep arrangement, each competing LEC has a powerful incentive to perform this function for its customers as efficiently as possible, because inefficiencies will have to be reflected in end user customer rates. Any arrangement other than bill-and-keep permits the less efficient carrier to subsidize its inefficiency by passing costs through to its more efficient rivals, and, indeed, amounts to double recovery — from both end users and rivals — of the same costs.

All of these factors should favorably dispose the Commission towards bill-and-keep arrangements in general. Jones limits its comments here, however, to one narrow area, of particular concern to new entrants, where Commission action could materially advance the goal of rapidly developing local exchange competition: temporary bill-and-keep arrangements during a new entrant's "start-up" phase.[41]

A facilities-based new entrant in the local exchange market must make substantial investments in transmission and switching capacity in order to serve its customers. This is so even though the initial number of customers may be small, and initial traffic volumes light. It may be that with a base of 20,000 customers generating millions of minutes of usage per month, the per-customer, or even per-minute, costs of the equipment and personnel needed to track,

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[40] Indeed, the ability to receive calls is part of the proposed definition of "universal service" under Section 254 in the context of the universal service proceeding. For this reason, the concern that the absence of a charge for terminating traffic could lead to an "excessive" number of calls, ***see Notice*** at ¶ 242, is misguided. While one can certainly imagine calls that are unwanted, in the vast majority of cases, a completed telephone call is of value to both parties to it.

[41] ***See Notice*** at ¶ 243 (seeking comment on when and whether the Commission should permit or require bill-and-keep arrangements).

record and bill LEC-to-LEC usage is small. But with a base of 200 customers generating only thousands of minutes of usage per month, those costs are substantial. At the same time, under any remotely reasonable per-minute rate for traffic termination, the absolute amounts at issue when customer counts and usage levels are low, the absolute amounts at issue for LEC-to-LEC traffic exchange are also low.

In these circumstances, the Commission could materially ease the burdens new entrants face in trying to break into the market by establishing a rule that it is presumptively unreasonable for an incumbent LEC to refuse to accept a bill-and-keep arrangement that is limited to the period during which the amount of traffic exchanged between the incumbent LEC and the new entrant is below some appropriate threshold.[42] The financial burden of such a rule on the incumbent LECs would be small (almost by definition). The administrative benefit to new entrants of not having to worry about traffic termination payments until a reasonable volume threshold is met, however, would be substantial.

The Commission, therefore, should include in its rules a provision that declares an incumbent LEC's refusal to assent to the use of bill-and-keep arrangements during an appropriately defined start-up period to be inconsistent with the requirements of Section 252(d).

C. The Commission Should Use Actual Negotiated Rates As An Evolving "Benchmark" For Transport And Termination Compensation.

Jones has suggested above that the Commission can advance the goal of open local exchange competition by maintaining a central list of the types of interconnection arrangements and network elements that any LEC in the country will provide to new entrants under a negotiated or arbitrated interconnection agreement. The Commission should use the same

[42] Jones suggests, for this purpose, a threshold of 5,000,000 minutes per month delivered by the new entrant to the incumbent LEC or vice-versa. The threshold should be stated in minutes to reflect the fact that in some cases a relatively small number of customers could impose very large usage demands on a network.

approach as a supplemental way to determine the reasonableness of incumbent LEC charges for traffic termination. Simply stated, the Commission should establish a presumption that all LECs can offer traffic termination at a rate that is no higher than the lowest rate that has been agreed to (or imposed through arbitration) for such traffic termination by ***any*** LEC.

This approach would use the LECs themselves as "benchmarks" for each other's performance. ***Cf. Notice*** at ¶ 244. It would also make it unnecessary for new entrants operating in many states to fight the same battles over and over again, including arbitration in front of different state commissions. It is also immensely practical and consistent with the statute.

The statute (Section 252(d)(2)(A)(ii)) requires only that an incumbent LEC"s rate for traffic termination be based on a "reasonable approximation" of the LEC's incremental costs. Most LECs, particularly most large LECs, use essentially the same types of switching and transmission equipment in their networks, purchased from the same vendors in the same national market. These large LECs have been regulated under essentially similar rules, including accounting rules established by this Commission, for most of their corporate existences. It seems unlikely, therefore, that there should be large cost-based differences in termination rates among large incumbent LECs.

In these circumstances, the lack of precision inherent in the "reasonable approximation" standard clearly permits the Commission to consider rates applicable to one LEC to be applicable to others as well.[43] Moreover, it would clearly benefit the development of competition to have traffic termination rates as low as possible. For this reason, the Commission can and should look to the ***lowest*** rate for termination applicable to any large LEC as the rate that will be applied to all large LECs.

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[43] Jones recognizes that smaller LECs may in some cases face different cost characteristics. It would, therefore, be reasonable to limit the application of Jones's proposal to Tier I LECs, at least initially.

V. Issues Relating To Resale.[44]

A. Conditions on the Resale of Services.

A broad resale obligation applied to incumbent LECs is particularly important at the early stages of opening up the local exchange market, formerly a regulated monopoly, to competition. Even though cable television companies (such as Jones) entering the local exchange market will likely do so, ultimately, by relying on their own facilities, the fact is that today, incumbent LECs have ubiquitous networks and near-100% market shares. This ubiquity is not a result of any superior business acumen or efficiency on the part of the incumbent LECs, but is instead the result of a superseded public policy favoring monopolies.

It will necessarily take some time for competitors to deploy facilities that are anywhere near as widespread as those of the incumbent LECs. This is an immense hurdle that has to be overcome if true competition is to develop as soon as possible, or, indeed, at all. An inevitable consequence of opening up the local exchange market to competition is to deprive the incumbent LECs of their monopoly advantages. But simply authorizing competition, without more, leaves the incumbent LECs with the unfair monopoly advantage of ubiquitous facilities and services. ***See Notice*** at ¶¶ 6-8

A broad resale obligation goes a long way toward solving this problem, because new entrants can have a "ubiquitous" presence in the market by reselling the incumbent LEC's services under their own brand names. In the long distance market, MCI, Sprint and others were initially able to offer nationwide long distance services by reselling AT&T services even though their own networks were far from ubiquitous.[45] Similarly, with a broad resale requirement, new

[44] This section of these comments addresses issues raised by Section II.B.3. and II.C.1 of the ***Notice.***

[45] ***See, e.g.,*** D. Gooding, "Death of the Resellers?," *Network World*, page 11 (Jan. 18, 1984) ("other common carriers such as MCI also resell WATS").

entrants in the local exchange business will be able to offer ubiquitous local exchange service even as they build out their own facilities in an economically prudent manner.

There are additional benefits to resale as well. For example, resale can spread the benefits of cost-based volume discounts among a broader group of customers. In the early stages of local exchange competition, incumbent LECs will enjoy economies of scale and scope that make cost-based volume discounts feasible. A reseller who buys a service at a cost-based bulk discount and passes some of the discount along to end users performs a valuable role by assembling a group of customers who together can use the incumbent LEC's services more efficiently than any of them could do individually. Indeed, in these circumstances a reseller can only earn a profit if it is able to market the services more efficiently than the incumbent LEC; otherwise, the volume discount would be consumed by the reseller's own costs of doing business.

Indeed, to the extent that an incumbent LEC retains residual market power due to the accident of its historical monopoly position, a broad resale obligation provides a market-based check on potential abuses of that position. For example, without a resale obligation, there will be numerous opportunities for the incumbent LEC to provide special terms (either lower rates or other favorable terms and conditions of the service) to a favored customer while depriving other customers of similar benefits. With a resale obligation, by contrast, any special deals that the incumbent LEC makes for one can ultimately be made available to all. Similarly, incumbent LECs with residual market power might be tempted to engage in predatory pricing in order to discourage competitors from entering a particular segment of the local exchange market. But if resellers can obtain an incumbent LEC's predatorily-priced service and resell it to customers in general, the incumbent LEC will think twice before offering any service at predatory, below-cost levels to begin with.

Under Section 251(b)(1), while outright bans on the resale of any service are prohibited, the imposition of some "conditions" on resale is permitted, as long as those conditions are neither "unreasonable" nor "discriminatory." It is conceivable, therefore, that an incumbent LEC might seek to impose any number of such "conditions," arguing in each case that nothing unreasonable or discriminatory is intended. To avoid this problem, the Commission should establish rules that require any incumbent LEC seeking to impose any "condition" on the resale of any of its services to show by clear and convincing evidence that the condition will directly advance an important public policy objective, and that the clearly identified benefit from the condition plainly outweighs the inevitable anticompetitive effect of resale conditions. ***Accord, Notice*** at ¶ 175. Without such an approach, incumbent LECs will have a powerful incentive to try to protect their residual monopoly advantages under the guise of purportedly "reasonable" restrictions.

Finally, although universal service questions are being addressed in the Section 254 proceeding, a comment on the interplay between resale and universal service concerns is warranted. To the extent concerns about universal service (and the availability of subsidies to support universal service) might previously have been seen as justifying resale restrictions, those concerns are now addressed separately under Sections 253(b), 254 and 214(e) of the new federal law. These provisions require universal service funding mechanisms to be "equitable," "nondiscriminatory" and "competitively neutral." With one exception, protecting universal service by restricting the resale of an incumbent LEC's services would fail these tests. The exception is the resale of explicitly subsidized services (Life-Line type offerings) to customers who do not qualify for the discounted service. ***See Notice*** at ¶ 176. Clearly, a special discount targeted to residential customers of limited means should not be made available, for example, to business customers.

B. Wholesale Discounts.

Under Section 251(c)(4), when a new entrant purchases an incumbent LEC's retail services for resale, the new entrant is entitled to a "wholesale" discount. Section 252(d)(3) specifies a particular class of costs — avoided costs — to be deducted from an incumbent LEC's retail rates in order to determine the appropriate wholesale price. The law also indicates that marketing and billing costs are examples of the type of avoided costs that are to be deducted.

The particular costs to be deducted from retail rates will vary from incumbent LEC to incumbent LEC, and even among services offered by a single incumbent LEC. It seems intuitively clear, for example, that most incumbent LECs spend more money marketing optional services such as Distinctive Ringing or Call Waiting than they do marketing basic local exchange service. Any generic costing guidelines the Commission might promulgate in this proceeding would not solve the individual question of how much cost would be avoided for particular services offered by particular I ECs.

Jones is concerned that the potential for facilities-based local exchange competition — clearly favored under the law (***see, e.g.,*** Section 271(c)(1)(A)) — could be stifled by an unwarranted focus on overly aggressive "wholesale" discounts, particularly when applied to services that the incumbent LECs can demonstrate are priced below cost to begin with. To see why, consider the following example (using hypothetical figures): Suppose that it costs an incumbent LEC \$25 per month to provide basic local exchange service, and that the retail price for that service is \$20. Suppose also that a facilities-based new entrant could offer equivalent service for only \$18, but still cover its costs due to its use of more modern and efficient technology. If an incumbent LEC's services were to be subjected to a presumptive "wholesale" discount of, for example, 25%, a reseller with an efficient marketing and billing operation could obtain the incumbent LEC's services for \$15 (25% off the retail price) and add \$2 to cover marketing, billing, and profit, for a total retail "resold" price of \$17. Under this scenario, the reseller would foreclose competition from the facilities-based new entrant because the reseller's costs (which would embody the incumbent's subsidized local exchange rates) would be lower than the new entrant's costs. This would occur even though the new entrant is actually more efficient than either the incumbent or the reseller. Such a result is obviously to be avoided.

None of this is to say that wholesale discounts off of an incumbent LEC's below-cost local exchange rates are not contemplated by the law. To the contrary, the only sound reading of the pricing standard of Section 252(d)(3) seems to be to start with the retail rate, whether below-cost or not, and to deduct certain identified costs from that rate.[46] And, in particular cases, the costs to be deducted may be substantial. The discussion above does illustrate, however, that there can be negative and anti-competitive results in the marketplace if the Section 252(d)(3) costing standard is not applied with great care to the case of retail rates that have been set below cost.[47]

VI. "Most Favored Nation" Status Under Section 252(i).[48]

Section 252(i) requires that "any interconnection, service or network element" included in an approved interconnection agreement be available to "any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." In two key respects, this "most favored nation" clause can play a critical role in promoting the development of local exchange competition, and this Commission should address this issue in its rules. ***Notice*** at ¶ 270.

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[46] ***See, e.g.,*** P. Huber, M. Kellogg & J. Thorne, *Special Report: The Telecommunications Act of 1996,* at 19 (1996).

[47] In this regard, if a new entrant seeks to obtain unbundled network elements from the incumbent LEC (as opposed to reselling a service offered to end users at retail), the prices for such network elements must cover cost. ***See*** Section 252(d)(1). Also, in most cases, it is quite likely that the incumbent LEC's retail rates already cover cost, in which case a wholesale rate based on excluding avoided costs will not lead to inefficiently and artificially low "resale" rates. The problem identified above, however, will exist in cases where a blanket wholesale discount is applied to below-cost prices embodied in an incumbent LEC's retail rates.

As the new law is implemented over time, it is not clear that below-cost pricing will be tolerated, other than in the context of targeted and competitively neutral universal service subsidies. For example, new Section 254(k) states flatly that "a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." Once a new entrant is offering local exchange services in competition with the incumbent LEC, therefore, the incumbent LEC would appear to have an affirmative obligation to increase the price of those services at least to the level it has identified as its own cost, in order to avoid subsidizing that newly competitive service. Once this has occurred, many of the difficulties associated with implementing the federally-mandated wholesale discounting obligation will disappear.

[48] This section of these comments addresses the issues raised in Section III.B. of the ***Notice.***

First, the Commission should make clear that a telecommunications carrier cannot be required to take an entire agreement as a "package deal" in order to obtain the benefit of a lower price for an "interconnection, service, or network element." ***Notice*** at ¶ 271. The contrary view would invite unfair bundling of unrelated services. One can imagine, for example, an incumbent LEC concluding that it would rather not face competition from a facilities-based competitor, and so entering into an agreement with a resale-based carrier that provides for low rates for traffic termination or local switching services, but only on condition that the resale-based carrier purchase a large number of unbundled loops (which a facilities-based carrier would not generally need). This illustrates that allowing "bundling" of unrelated services (or interconnection arrangements or network elements) would give incumbent LECs the opportunity to shape the type of competition it will face by preferring one competitor or group of competitors over another.[49]

Second, the Commission should make clear that a new entrant who has an interconnection agreement in force with the incumbent LEC may, on the basis of Section 252(i), modify that completed agreement to substitute the preferable terms included in a later agreement that the incumbent LEC enters with another new entrant. Otherwise, the purpose of Section 252(i) will be frustrated while the earlier-established interconnection agreements run their terms. Indeed, if modification of existing agreements is not possible, then incumbent LECs will, in effect, be able to impose the "package deals" discussed above, since the preferable terms in one agreement will be made available to other new entrants only when those new entrants are seeking to negotiate a ***new*** complete interconnection agreement following the expiration of the original one.

Jones recognizes, of course, that some low rates may reasonably be conditioned on term or volume commitments that a particular new entrant may not want to accept. This Commission's extensive experience with term and volume discount plans, however, could be

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[49] Intra-agreement "bundling" appears to be inconsistent with the legislative history quoted in the ***Notice*** at ¶ 271, which refers to "individual" elements being available.

applied to resolve any disputes about whether an incumbent LEC's refusal to offer a lower rate without such commitments was reasonable.

Conclusion

The rules the Commission establishes in this proceeding will shape the development of local exchange competition for years to come. The Commission, therefore, has a special obligation to ensure that the over-arching goal of promoting such competition is not lost in a welter of technical and regulatory complexity. To meet that obligation requires several steps. First, the Commission must resolve all conflicts among possible interpretations of the new law in favor of the development of competition, and narrowly limit any exceptions. Second, the Commission should adopt rules fostering competition that are applicable equally throughout the nation, both to ensure that Congress's goals are substantively achieved and to allow new entrants to plan sensibly. Third, the Commission should collect and publish information that will serve to "benchmark" the competitive performance of incumbent LECs in terms of meeting their obligations under the new law, whether in the area of technical means of interconnection, pricing of interconnection, availability and pricing of network elements, conditions on resale, or wholesale discounts. These steps will lead to the most rapid possible development of effective local exchange competition, as called for by the law.

Respectfully submitted,

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